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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN J. FELLERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1) Should the fruit of the poisonous tree doctrine extend to exclude evidence of a confession taken in compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) but which occurred after an earlier violation of *Massiah* v. *United States*, 377 U. S. 201 (1964)?

2) Should *Massiah* continue to regulate direct confrontations between the police and the accused?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to criminal justice in order to protect and advance the rights of victims of crime and the law-abiding public.

This case threatens to extend the costly rule of *Massiah* v. *United States*, 377 U. S. 201 (1964) to strike down an otherwise valid confession as derivative evidence under the fruit of the poisonous tree doctrine. The threat to society of lost convictions and frustrated investigations from extending *Massiah* is

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

contrary to the interests of justice and public safety that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

After the defendant, John J. Fellers, was indicted for conspiracy to distribute methamphetamine, two police officers went to Fellers' house to arrest him on the charge. See *United States* v. *Fellers*, 285 F. 3d 721, 723 (CA8 2002). The officers told Fellers that they were there pursuant to an indictment and that they wanted to discuss his involvement in the conspiracy. See *ibid.* Fellers indicated that he had associated with the people named by the officers and that he had used methamphetamine. See *ibid.* The officers did not give Fellers any *Miranda* v. *Arizona*, 384 U. S. 436 (1966) warnings at this time. See *Fellers*, *supra*, at 723. Fellers was then taken to jail, where he was given *Miranda* warnings, signed a waiver and talked to the officers, reiterating his inculpatory statements and admitting to his association with several more co-conspirators. See *ibid.*

Fellers was tried in Federal District Court. The magistrate judge found that Fellers was in custody at the time of the first statement and that both statements should be suppressed. *Ibid.*[2] The district judge suppressed the statements made at Fellers' home, but admitted those made at the jail. See *ibid.* A jury convicted him of conspiracy to distribute between 50 and 500 grams of methamphetamine. See *ibid.*

The Court of Appeals, citing *Oregon* v. *Elstad*, 470 U. S. 298 (1985), affirmed the conviction and sentence. See *Fellers*, 285 F. 3d, at 274. This Court granted certiorari on March 10, 2003.

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2. This case illustrates, once again, how the vague definition of custody has failed to give police clear guidance. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *United States* v. *Patane*, No. 02-1183, at 14.

SUMMARY OF ARGUMENT

The Sixth Amendment entitles the defendant to counsel in certain critical stages of the prosecution where an attorney's advocacy or legal expertise is necessary to preserve a fair trial and a reliable verdict. The encounters regulated by *Massiah* v. *United States* do not call for the legal expertise or advocacy of counsel. This is particularly true in the case of encounters between the police and the accused, which are now governed by *Miranda* v. *Arizona*. At best, *Massiah* creates a right to fairness by preventing the defendant from compromising his or her defense after the prosecution begins. This departure from Sixth Amendment principles comes at a high cost in lost voluntary admissions of guilt and delayed prosecutions. *Massiah* pushes the boundaries of the Sixth Amendment so far that it should not be extended any further.

The "fruit of the poisonous tree" doctrine is applied only when it preserves the core values of the underlying right that was violated. As an extension of the already costly exclusionary rule, the fruits doctrine should only be imposed when it is absolutely necessary.

There are instances where suppressing derivative evidence is not controversial. Where the government gains knowledge about other tangible evidence through an illegal act and then exploits that knowledge to gain possession over the newly discovered evidence, the fruits doctrine must apply. Since the causal connection between the illegal act and the derivative evidence is inseparable in these cases, failing to suppress the derivative evidence would fatally undermine the underlying right.

Applying the fruits doctrine to confessions is not as simple. Since a valid confession is a voluntary act, the causal connection between the constitutional violation and the allegedly derivative confession is more difficult to find. These cases involve a more detailed analysis which turns on constitutional policy. Fifth Amendment interests drove the decision not to

extend the fruits doctrine to an otherwise valid confession that followed an earlier *Miranda* violation. The analysis of confessions following Fourth Amendment violations follows the same pattern. This type of analysis governs the application of the fruits doctrine in this case.

No legitimate Sixth Amendment interest is served by suppressing a confession that satisfies *Miranda* simply because it follows a *Massiah* violation. *Massiah* itself serves no core Sixth Amendment principles, and since suppressing voluntary confessions is costly to society, the balance of interests tips heavily against suppression.

Massiah should no longer apply to direct confrontations between the police and the accused. *Massiah*'s cost to society, inconsistency with Sixth Amendment principles, and minimal reliance interest all support a partial reconsideration of *Massiah*. *Miranda* renders *Massiah* redundant in direct encounters between the police and the accused. Removing *Massiah* from these cases would minimally alter existing precedent and prevent defendants from accruing windfalls.

ARGUMENT

Amicus will address whether an initial violation of *Massiah* v. *United States*, 377 U. S. 201 (1964) prevents the admission of a subsequent confession that was taken after a valid *Miranda* v. *Arizona*, 384 U. S. 436 (1966) waiver. This "fruit of the poisonous tree," see *Nardone* v. *United States*, 308 U. S. 338, 341 (1939), analysis is premised on the assumption that the arresting officers violated *Massiah* when they told Fellers that they wanted to talk about his involvement with the drug conspiracy. It is worth noting, however, that it is far from clear that Fellers' *Massiah* rights were in fact violated. Under *Massiah*, the admissibility of a post-indictment statement turns on whether it was deliberately elicited from the accused by the police, see 377 U. S., at 206, absent a valid waiver of the right to counsel. The conclusion that the officers' first encounter

with Fellers comes under this vague standard is an open question, but *amicus* chooses to concentrate on broader issues concerning *Massiah* and the fruits doctrine. *Amicus* argues that an initial *Massiah* violation should not cause the suppression of a subsequent voluntary confession under the fruit of the poisonous tree doctrine.

The conclusion that *Massiah* does not bar a subsequent valid confession stands on another premise, that an indicted defendant can be interrogated by the police without the presence of defense counsel if the defendant gives a valid *Miranda* waiver. Since *Miranda* warnings inform the defendant of his right to counsel, see *Miranda*, 384 U. S., at 479, a valid *Miranda* waiver will also validly waive any *Massiah* right to counsel. *Patterson* v. *Illinois*, 487 U. S. 285, 293 (1988). As the second confession satisfies *Massiah* as well as *Miranda*, the only question is whether an initial *Massiah* violation requires suppressing this otherwise valid admission of guilt. The answer is "no."

I. *Massiah* extends the Sixth Amendment to its "outermost point," and it should not be extended any further.

Massiah v. *United States*, 377 U. S. 201 (1964) was a revolutionary decision. *Massiah*'s revolution was how it extended the right to counsel to regulate the government's power to investigate defendants after the initiation of proceedings. These encounters differ greatly from the other critical stages recognized by the Court, because they do not raise the same need for counsel's presence found in the other Sixth Amendment cases. As Justice Blackmun observed, "*Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point." *United States* v. *Henry*, 447 U. S. 264, 282 (1980) (Blackmun, J., dissenting). Since application of the fruit of the poisonous tree doctrine is a function of the principles of the violated constitutional right,

see Part II, *infra*, understanding *Massiah*'s revolution is essential.

A. Sixth Amendment Principles.

An understanding of *Massiah*'s divergence from the Sixth Amendment begins by examining the principles of the right to counsel. History provides only limited guidance for interpreting the right. The Sixth Amendment broke from the English common law practice, which placed substantial limits upon the accused's ability to employ counsel. See *Powell* v. *Alabama*, 287 U. S. 45, 60 (1932); Office of Legal Policy, Report to the Attorney General on The Sixth Amendment Right to Counsel Under the *Massiah* Line of Cases, 22 U. Mich. J. L. Ref. 661, 672-673 (1989) ("*Massiah* Right to Counsel"). Unfortunately, the Founders provided no guidance as to why the right to counsel was included in the Sixth Amendment, or what it meant. See W. Beaney, The Right to Counsel in American Courts 23-24 (1955).

While the history of the right to counsel is dim, the rationale behind it is better understood. The classical justification for providing attorneys for criminal defendants is found in *Powell*.

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." 287 U. S., at 69.

An attorney's aid is not constitutionally required simply to give assistance to the defendant. It is to provide the accused with someone "skill[ed] in the science of law." See *ibid.* As Justice Black noted, the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U. S. 458, 462-463 (1938).

The right to counsel is governed by these considerations. The "core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U. S. 300, 309 (1973). "This review of the history and expansion of the Sixth Amendment Counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.*, at 313.

The decisions other than *Massiah* expanding the right to counsel to pretrial stages are consistent with these principles. Counsel's presence at the preliminary hearing can prevent an erroneous prosecution, develop impeaching evidence against the government's witnesses at trial, discover the State's case, or make effective arguments for an early mental examination or bail. See *Coleman* v. *Alabama*, 399 U. S. 1, 9 (1970) (plurality). An unrepresented defendant cannot do this, see *ibid.*, to his or her considerable detriment. In *Hamilton* v. *Alabama*, 368 U. S. 52 (1961), an insanity plea, pleas in abatement, and grand jury discrimination challenges had to be made at the arraignment. See *id.*, at 53-54. The ability to understand the defense and make the plea is the unique province of counsel. An unrepresented defendant could lose these defenses forever, see

id., at 54, justifying an extension of the right to counsel to this phase of the prosecution.

The extension of the right to counsel outside the courtroom is no different. In *United States* v. *Wade*, 388 U. S. 218 (1967), this Court recognized a right to counsel at post-indictment identification lineup. The opinion began with a framework for determining when to apply the right to counsel to a pretrial encounter. The principles of *Powell* "calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.*, at 227.

Not every pretrial effort to identify the defendant required the presence of counsel. Analysis "of the accused's fingerprints, blood sample, clothing, hair, and the like," see *ibid.*, without defense counsel did not threaten the trial's fairness because the veracity of any identification could be tested by cross-examining the government's expert witnesses at trial and presentation of defendant's own experts. See *id.*, at 227-228. The lineup, however, posed a risk of misidentification of the perpetrator that could not be readily corrected through confrontation at trial. "But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.*, at 228. Eyewitness identification raises genuine issues about the reliability of a conviction. There are justifiable concerns about the accuracy and reliability of eyewitness testimony, see *id.*, at 228-229; *Manson* v. *Brathwaite*, 432 U. S. 98, 111-112 (1977), but nonetheless eyewitnesses have enormous influence over juries. See E. Loftus & J. Doyle, Eyewitness Testimony: Civil and Criminal § 1-2, p. 2 (3d ed. 1997). Therefore eyewitness misidentification is perhaps the largest source of wrongful convictions. See *Wade*, 388 U. S., at 229.

Wade's right to counsel protects defendants from misidentification at the lineup. The presence of counsel guards against

rigged lineups, like a lineup of six white men and one black man, see Loftus & Doyle, § 6-17(b), at 143, as well as more subtle forms of suggestion. See *id.*, § 6-12, at 130. Assessing the reliability of a lineup identification requires detailed analysis of a host of complex factors. See *id.*, § 6-17, at 140-141. The accused in a lineup needs someone with counsel's knowledge of the problems and practices of lineups to guard against a wrongful identification. See *Wade*, 388 U. S., at 230-231. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 231-232. Quite simply, *Wade* provides criminal defendants with an essential guard against wrongful conviction.

The cases declining to extend the right of counsel to particular events are consistent with these principles. Where the accused is not faced with complex legal proceedings or some other substantial risk of an unfair trial, then there is no critical stage that warrants a right to counsel. Taking handwriting exemplars is not a critical stage because "there is minimal risk that the absence of counsel might derogate from his right to a fair trial." *Gilbert* v. *California*, 388 U. S. 263, 267 (1967). Similarly, no counsel was required for a post-indictment *photo* lineup because "no possibility arises that the accused might be mislead with his lack of familiarity with the law or overpowered by his professional adversary," and counsel would not "be used to produce equality in a trial-like adversarial confrontation." *Ash*, 413 U. S., at 317.

With one notable exception, the right to counsel cases are consistent. Absent the initiation of proceedings against the accused and the presence of complex legal proceedings or a special threat to the fairness of the trial, an event is not covered by the right to counsel. The one exception to this rule is *Massiah*.

B. Massiah's Revolution.

Understanding *Massiah*'s revolution begins by analyzing its facts and reasoning. Massiah, Colson, and some others were indicted on a variety of federal narcotics charges. See 377 U. S., at 202. Colson agreed to work with the government and allowed a federal agent to place a radio transmitter in his car. See *id.*, at 202-203. The federal agent used this transmitter to surreptitiously overhear incriminating statements made by Massiah during a conversation with Colson, which were then recited at Massiah's trial. See *id.*, at 203.

Massiah claimed that the use of the transmitter violated the Fourth Amendment, while the government's deliberate elicitation of statements from him in the absence of counsel violated the Fifth and Sixth Amendments. See *id.*, at 203-204. Instead of dealing with a tricky Fourth Amendment issue regarding the eavesdropping, see 2 W. LaFave, J. Israel, & N. King, Criminal Procedure 6.4(b), p. 479 (2d ed. 1999), this Court bypassed the Fourth Amendment claim, see *Massiah*, *supra*, at 204, and began its analysis with an examination of *Spano* v. *New York*, 360 U. S. 315 (1959). See *Massiah*, *supra*, at 204. *Spano* was a confession case in which the Court's opinion struck down the conviction because the confession failed the due process voluntariness test. See 360 U. S., at 323-324. Four concurring Justices stated that the confession should be suppressed because the defendant had a right to counsel during this post-indictment questioning. See *id.*, at 326 (Douglas, J., concurring); *id.*, at 327 (Stewart, J., concurring). The *Massiah* Court noted the *Spano* concurrences, and the fact that since *Spano*, New York courts recognized a right to counsel in any interrogation after indictment. See 377 U. S., at 204-205. The rest of the opinion extends the rule of the *Spano* concurrences beyond custodial interrogations to the facts of *Massiah*, see *id.*, at 206, and explains that this new rule does not needlessly prevent the continuing investigation of a defendant after an indictment. See *id.*, at 206-207.

Massiah is notable for lacking any substantial justification for its holding. "The doctrinal underpinnings of *Massiah* have been largely left unexplained . . . ." *Henry* v. *United States*, 447 U. S. 264, 290 (1980) (Rehnquist, J., dissenting). This Court's interpretations of *Massiah* add little to its scant justification. The "Christian burial speech" case, *Brewer* v. *Williams*, 430 U. S. 387, 392-393 (1977), found *Massiah* applicable to a case where it characterized the police conduct as equal to or more effective than interrogation. *Id.*, at 399. Its explanation of the reasons for *Massiah* consisted of a quotation from Justice Sutherland's famous passage from *Powell*, see *id.*, at 398, and the conclusion that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Ibid.* The rest of the analysis focused on finding that the speech violated *Massiah*, see *id.*, at 399-401, and that the *Massiah* right to counsel could not be waived implicitly. See *id.*, at 401-406.

Other decisions provide no additional justification for *Massiah*. The case dealing with Williams' conviction on retrial, *Nix* v. *Williams*, 467 U. S. 431 (1984), addressed whether the victim's body that was discovered through the Christian burial speech should be suppressed under the fruit of the poisonous tree doctrine. See *id.*, at 441. The *Nix* Court's use of the fruit of the poisonous tree doctrine is discussed later in this brief, see *infra*, at 16-17, but like *Brewer*, it contains no meaningful explanation of *Massiah*'s basis. *Henry* addressed what is meant by *Massiah*'s use of the term "deliberately elicited." See 447 U. S., at 270. It was able to decide the issue without explaining *Massiah*'s rationale any further. See *id.*, at 290 (Rehnquist, J., dissenting).

Only *Maine* v. *Moulton*, 474 U. S. 159 (1985) has provided any semblance of analytical support for *Massiah*. The opinion noted the importance of the right to counsel and quoted from the passage in *Powell*. See *id.*, at 169. It explained that the right to counsel is not limited to the trial, but rather "is shaped

by the need for assistance of counsel." *Id.*, at 170. After this was a brief recitation of the critical stages doctrine, see *ibid.*, a recitation of the passage from *Brewer* quoted above, see *ibid.*, and a concluding passage about the importance to the defendant of the initiation of proceedings. See *ibid.* Absent from *Moulton* or any other Supreme Court opinion is a detailed analysis of how *Massiah* advances Sixth Amendment principles.

Massiah lacks better justification because it is so difficult to justify. Defendants are entitled to counsel when there is a special need for counsel's legal expertise or advocacy. Just as the Scottsboro boys could not be expected to defend themselves without the help of an attorney until the morning of the trial, *Powell*, 287 U. S., at 56, a layperson cannot effectively represent himself or herself at a preliminary hearing or arraignment. See *Coleman* v. *Alabama*, 399 U. S. 1, 9 (1970) (plurality); *Hamilton* v. *Alabama*, 368 U. S., at 54-55; *supra*, at 6-8.

Massiah does not present a similar need for legal expertise. "In this situation, the accused is not confronted with complex legal procedures or by an expert adversary . . . ." *Massiah* Right to Counsel, 22 U. Mich. J. L. Ref., at 685-686. Most *Massiah* cases have not involved any direct confrontation between the government and the accused. Instead, in the typical case, the government used an informer as an agent to gather information by talking to the defendant about the case. See *Massiah*, 377 U. S., at 201; *Henry*, 447 U. S., at 266; *Moulton*, 474 U. S., at 161. While counsel can preserve a defense at an arraignment or prevent an unfair lineup at the stationhouse, these undercover operations do not create a need for the special expertise or advocacy of the attorney. The risk of speaking to a person who may "snitch" is well within the knowledge and experience of laymen.

Direct encounters between the police and the indicted defendant, see *Brewer*, 430 U. S., at 392; *United States* v. *Fellers*, 285 F. 3d 721, 723 (CA8 2002), provide no more justification for a separate Sixth Amendment right to counsel's

presence. Most police attempts to elicit information directly from indicted suspects will be custodial interrogations governed by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Since a valid *Miranda* waiver also waives the *Massiah* right to counsel, see *Patterson* v. *Illinois*, 487 U. S. 285, 293 (1988), *Massiah* is redundant in most confrontations between the police and an indicted defendant. See *infra*, at 29-30. *Massiah* will govern only in those rare confrontations where the accused is questioned but not in custody, or when the police attempt to deliberately elicit information from the defendant through methods that fall short of actual interrogation. See *Henry*, 447 U. S., at 271 (acts short of interrogation come within the deliberately elicit standard). Even if such a confrontation is possible, where *Miranda* is unnecessary there must be little need for the *Massiah* right to counsel.

A sense of fairness is the best explanation for *Massiah*. See *Massiah*, 377 U. S., at 205 (quoting *People* v. *Waterman*, 175 N. E. 2d 445, 448 (N.Y. 1961)). Since there is no real need for the legal expertise or the advocacy skills of counsel in the confrontations that *Massiah* governs, *Massiah*'s right is more like a "cover for a judicially imposed policy against the use of post-indictment confessions." See *Massiah* Right to Counsel, 22 U. Mich. J. L. Ref., at 688. The initiation of proceedings entitles the defendant to the assistance of counsel. See *Brewer*, 430 U. S., at 398. The availability of counsel before the trial gives the defendant's attorney the opportunity to prepare the case and mount an effective defense. See *ibid.* Knowingly eliciting incriminating information from the accused during this preparatory phase can all but end the defense before it begins. Once a confession is obtained by the police or undercover informants, counsel's role may be reduced to finding the best plea bargain under the difficult circumstances produced by the accused's admissions.

Massiah guards against an alleged unfairness that is neither particularly unfair, nor within traditional province of counsel. A *Massiah* violation does not deprive the defendant of counsel

in any normal sense. "Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed." *Massiah*, 377 U. S., at 209 (White, J., dissenting). At best, this right operates at the far reaches of the right to counsel.

Massiah exacts a high price for its extreme application of the right to counsel. It excludes highly relevant, voluntary, self-incriminating statements from the accused. Confessions and admissions to third parties are not mere necessary evils. "[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . ." *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991). Such admissions "are more than merely 'desirable,' [citation] they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986). *Massiah* also creates an incentive to delay initiating proceedings against a suspect until the investigation is complete. This leaves potentially dangerous suspects to prowl the streets longer than due process requires. See *Massiah* Right to Counsel, 22 U. Mich. J. L. Ref., at 689. Even if this Court decides not to modify *Massiah*, see Part IV, *infra*, the Sixth Amendment should not be stretched any further.

II. The costly fruit of the poisonous tree doctrine is applied only when it preserves the core values of the underlying constitutional right.

If this Court finds that the initial encounter between Fellers and the arresting officers produced a *Massiah* violation, then this case centers on whether the fruit of the poisonous tree doctrine extends to cover the jailhouse confession that was taken in conformity with *Massiah* and *Miranda* v. *Arizona*, 384 U. S. 436 (1968). See *supra*, at 4-5. Courts administering this derivative evidence doctrine must be careful not to substitute metaphor for analysis. "Metaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey* v. *Third Ave. R. Co.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926) (Cardozo, J.). The fruit of the poisonous tree is a metaphor, see *Oregon* v. *Elstad*, 470 U. S. 298, 303 (1985), that is misleading when taken out of context. It is a more limited doctrine than its broad metaphor seemingly suggests.

A. The Costly Doctrine.

The fruit of the poisonous tree doctrine is an extension of the exclusionary rule. Under the exclusionary rule, evidence taken through means that violate the Fourth Amendment is excluded in order to deter future constitutional violations. See *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). The exclusion of relevant, reliable evidence comes at a high cost to society. See *Stone* v. *Powell*, 428 U. S. 465, 490-491 (1976). The fruits doctrine goes one step further, extending the exclusionary rule to evidence taken in a constitutional manner but somehow "tainted" by a prior constitutional violation, making an already costly doctrine even more expensive.

This Court appreciates the high cost of this doctrine. "The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Nix* v. *Williams*, 467 U. S. 431, 442-443 (1984). Therefore, the fruits doctrine is applied practically rather than mechanically. Any application of the fruits doctrine must consider the context of the initial constitutional violation and the derivative evidence under attack.

B. Uncontroversial Applications.

There are times when the fruits doctrine can be applied without controversy. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920) provides the template for excluding

derivative evidence. After an indictment against the company, agents of the United States illegally entered its office "and made a clean sweep of all the books, papers, and documents found there." *Id.*, at 390. The Court ordered the originals returned, but the government made copies and used them to subpoena Silverthorne Lumber to produce the originals. See *id.*, at 390-391. Forcing the company to produce the records through this trick "reduces the Fourth Amendment to a form of words." *Id.*, at 392. The government cannot be allowed to exploit the illegal seizure to legally acquire the goods it illegally seized. The Fourth Amendment protects privacy. See *Payton* v. *New York*, 445 U. S. 573, 589 (1980). Upholding the subpoena in *Silverthorne* would have made a mockery of the company's privacy.

Silverthorne demonstrates that it is comparatively simple to apply the fruits doctrine to tangible evidence obtained in this manner. In these cases, the government typically gains knowledge of the evidence through an illegal act, and then uses that knowledge to gain possession over the newly discovered piece of evidence. Where the causal connection between the illegal act and the derivative evidence is inseparable, failing to suppress the derivative evidence fatally undermines the underlying right.

Nix v. *Williams*, 467 U. S. 431 (1984) is a more modern example of this relationship between a constitutional violation and derivative evidence. This decision addressed the second trial of the defendant in *Brewer* v. *Williams*, 430 U. S. 387 (1977). While the *Brewer* Court held that *Massiah* suppressed the statements of Williams that were induced by the "Christian burial speech," it reserved the issue of whether the fruits of that speech should be suppressed. See *id.*, at 406-407, n. 12. *Nix* applied the fruits doctrine to this *Massiah* violation, see 467 U. S., at 441-442, but admitted the derivative evidence under the inevitable discovery exception. See *id.*, at 448. Like *Silverthorne*, there was an unmistakable connection between

the constitutional violation and the tangible fruits of that violation.

The speech struck down in *Brewer* was an appeal to Williams to identify the location of his victim's body so that the young girl might be given a proper Christian burial. See 430 U. S., at 392. *Nix* addressed the admissibility of "evidence pertaining to the discovery and condition of the victim's body . . . ." 467 U. S., at 434. Williams' responses to the illegal speech allowed the government to find the victim's body. Since the *Massiah* violation gave the government the knowledge that allowed them to find this derivative evidence, the *Nix* Court had no choice but to apply the fruits doctrine.[3]

Nix cited *United States* v. *Wade*, 388 U. S. 218 (1967) for the proposition that the fruits doctrine applied to Sixth Amendment violations. See 467 U. S., at 442. *Wade* involved uniquely compelling reasons to suppress derivative evidence. *Wade* held that a post-indictment lineup without counsel violated the Sixth Amendment, 388 U. S., at 237, and that any in-court identification of the accused by witnesses who participated in the unconstitutional lineup was subject to suppression under the fruits doctrine. See *id.*, at 241 (applying *Wong Sun* v. *United States*, 371 U. S. 471 (1963)). Here, the constitutional violation did not allow the government to discover the derivative evidence. Instead, the initial Sixth Amendment violation rendered the derivative evidence unreliable.

The primary threat posed by lineups is misidentification through suggestion. "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for

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3. While the result in *Nix* differed from that in *Silverthorne*, that is a result of the availability of the inevitable discovery rule rather than the relationship between the derivative evidence and the constitutional violation. Compare *Nix*, 467 U. S., at 449-450, with *Silverthorne*, 251 U. S., at 392.

pretrial identification." *Wade*, 388 U. S., at 228. Once the witness identifies the victim in a lineup there is usually no going back for the witness.

> "Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.' " *Id.*, at 229 (footnote omitted).

Wade's right to counsel guards against improperly suggestive lineups. See *id.*, at 236-237. A lineup lacking this protection can illegally transmit the information that the accused is the perpetrator from the government to the witness. Once the witness accepts this suggestion he or she is almost certain to repeat it at trial, giving the government valuable evidence that is almost impossible to attack through cross-examination. See *id.*, at 232. Any in-court identification after an uncounseled lineup poses an excessive risk of being unreliable. The *Wade* Court had little option but to apply the fruits doctrine and require the government to purge the taint. See *id.*, at 241.

The present case is distinguished from these by the fact that the allegedly tainted evidence is a confession. Confessions are not discovered like photographs, drugs, or a body. A valid confession must be the voluntary act of the defendant. See *Dickerson* v. *United States*, 530 U. S. 428, 433 (2000). The exploitation of improperly gained knowledge does not enter this equation. A defendant who voluntarily confesses knows that he or she is guilty, and the interrogating officer thinks the same. This does not render the fruits doctrine irrelevant to confessions obtained after constitutional violations. Indeed, the most famous fruits case involved the suppression of a derivative confession. See *Wong Sun* v. *United States*, 371 U. S. 471, 485-486 (1963). Confessions, however, require more detailed analysis than found in the previously mentioned applications of

the fruits doctrine. This analysis reveals the true nature of the fruits doctrine.

C. Confessions and Complex Analysis.

The Court's treatment of confessions under the fruits doctrine shows how this doctrine is driven by constitutional policy. *Oregon* v. *Elstad*, 470 U. S. 298 (1985) demonstrates this relationship between the Constitution and the fruits doctrine. *Elstad* involved an initial interrogation that produced a confession taken contrary to the *Miranda* rule, followed by a confession by the same suspect that complied with *Miranda*. See *id.*, at 300. Instead of unthinkingly applying the fruits doctrine to suppress the second confession, the *Elstad* Court examined the constitutional ends served by the Fifth Amendment and *Miranda*.

The opinion first examined *Miranda*'s relationship to the Fifth Amendment. "*Miranda* required suppression of many statements that would have been admissible under traditional due process analysis" through its conclusive presumption. See *id.*, at 304. This overprotection of the Fifth Amendment, see *id.*, at 306, came at a considerable cost. Voluntary confessions play a valuable role in our criminal justice system. See *id.*, at 305. "*Miranda*'s preventative medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Id.*, at 307. This means that a failure to give *Miranda* warnings is not itself a constitutional violation, see *id.*, at 306, and n. 1, and thus statements taken contrary to *Miranda* can be used for other purposes. See *id.*, at 307. Since *Miranda* already operates at the limits of the Fifth Amendment, applying the fruits doctrine to subsequent confessions would push this rule too far.

> "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary

and informed waiver is ineffective for some indeterminate period." *Id.*, at 309.

The *Elstad* Court compared *Miranda* to the Fourth Amendment exclusionary rule and found "fundamental differences" between the two. *Id.*, at 304. The Fourth Amendment's exclusionary rule only deters constitutional violations, see *id.*, at 306, as opposed to *Miranda*'s overdeterrence. This justified a broader application of the fruits doctrine to Fourth Amendment violations than to *Miranda* claims. See *ibid.* Since excluding an allegedly derivative, but otherwise legal confession would not advance the legitimate interests of *Miranda* or the Fifth Amendment, suppression was not justified.

Even the "traditionally mandated broad application" of the fruits doctrine to Fourth Amendment violations, see *ibid.*, requires justification derived from constitutional policy. This reasoning is found in the first broad application of the doctrine, *Wong Sun* v. *United States*, *supra*. *Wong Sun* addressed the admissibility of statements made by the arrestee in the course of his illegal arrest. See 371 U. S., at 484. It held that since the statements were derived from an illegal seizure they must be excluded under the logic of the exclusionary rule.

> "Either in terms of deterring lawless conduct by federal officers, [citation] or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, [citation] the danger of relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction." *Id.*, at 486.

The decisions after *Wong Sun* reinforce and explain the relationship between the fruits doctrine and the constitutional right it protects. *Brown* v. *Illinois*, 422 U. S. 590 (1975) addressed the impact of *Miranda* on *Wong Sun*. Since *Wong Sun* was decided before *Miranda*, a valid *Miranda* waiver might distinguish the case from *Wong Sun* and the fruits doctrine. See *id.*, at 591-592. This claim was rejected because of the role played by illegal seizures in securing confessions.

" '[T]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment.' " *Id.*, at 602 (quoting *Boyd* v. *United States*, 116 U. S. 616, 633 (1886)).

Custody does play an important role in securing confessions. The isolation and control brought about by custody placed considerable pressure to confess on the suspect. "[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Miranda*, 384 U. S., at 455. The "inherently compelling pressures" on custodial suspects justified requiring the *Miranda* warnings before custodial interrogations. See *id.*, at 467. Therefore illegal arrests give police an unwarranted edge in getting the suspect to confess.

If the fruits doctrine did not apply to confessions following illegal arrests, then the temptation to arrest without probable cause would be too great.

> "Arrests made without warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.' " *Brown*, 422 U. S., at 602-603 (footnote omitted).

The close connection between illegal arrests and confessions meant that the prosecution must independently establish that the confession was "the product of a free will under *Wong Sun*" under "the facts of each case." *Id.*, at 603. While *Miranda* played an important role in attenuating the taint of the illegal

arrest, it was far from dispositive on this issue. See *id.*, at 603-604.

Like *Elstad*, the *Brown* decision reflected the different interests served by the Fourth and Fifth Amendment exclusionary rules. See *id.*, at 601. "*Brown* articulated a test designed to vindicate the 'distinct policies and interests of the Fourth Amendment.' " *Dunaway* v. *New York*, 442 U. S. 200, 217 (1979) (quoting *Brown*, 422 U. S., at 602). It focused on the relationship between the illegal arrest and the confession in order to advance the policies behind the Fourth Amendment exclusionary rule. See *Dunaway*, *supra*, at 217-218. Concentrating on the causal connection between the arrest and the confessions reinforces the exclusionary rule's deterrent and promotes the integrity of the courts. See *id.*, at 218. Where suspects are arrested without probable cause in the hope that they will confess while in custody, police should not profit from that illegality without some meaningful intervening event. See *Taylor* v. *Alabama*, 457 U. S. 687, 693 (1982).

Confessions are treated differently than other evidence because the causal connection between a voluntary confession and a prior constitutional violation is more difficult to establish. *Brown*, *Wong Sun*, and *Dunaway* show that application of the fruit of the poisonous tree doctrine is driven by constitutional policy rather than by simple logical causation. While the custody gained through an arrest may be an important factor in securing a confession, custody does not "cause" a confession in any logical sense. At least since *Miranda*, many custodial interrogations do not generate confessions. See Cassel, Protecting the Innocent from False Confessions and Lost Confessions—And from *Miranda*, 88 J. Crim. L. & Criminology 497, 542 (1998). Under the fruits doctrine, causation in this sense is a function of constitutional policy. Derivative evidence is only excluded when necessary to protect the principles of the constitutional right that was violated.

The inevitable discovery exception reflects this limited fruits doctrine. In *Nix* v. *Williams*, 467 U. S. 431 (1984), the

purpose of the Sixth Amendment right to counsel drove the application of this exception. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Id.*, at 446. The Sixth Amendment guards against unfairness by testing the reliability of evidence through the adversary process. See *ibid.* Since there was no reason to doubt the reliability of the evidence here, see *ibid.*, "[s]uppression, in these circumstances would do nothing to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." *Ibid.* The Sixth Amendment insures fairness by protecting the defendant from "one-sided" confrontations with the prosecution. See *id.*, at 447 (internal quotation marks omitted). If application of the fruits doctrine places the state in the same position it would be in if the constitutional violation never happened, then fairness is assured. See *ibid.* Admitting evidence that would have been discovered anyway only keeps the state from being put in a worse position, which is only fair. See *ibid.*

Decisions to apply the exclusionary rule in particular circumstances are made through a cost-benefit analysis. This applies both to the types of proceedings to which the exclusionary rule extends, see *Immigration & Naturalization Service* v. *Lopez-Mendoza*, 468 U. S. 1032, 1042 (1984) (deportation proceedings), or when deciding not to apply the exclusionary rule to a particular set of facts. See *United States* v. *Leon*, 468 U. S. 897, 913 (1984) (good faith exception for warrant searches); *Elstad*, 470 U. S., at 312. As in *Elstad*, any decision on whether to apply the fruits doctrine to this case must be informed by balancing the relevant constitutional interests. The balance tilts sharply against excluding voluntary confessions made after *Massiah* violations.

III. The fruit of the poisonous tree doctrine should not be applied to an otherwise valid confession made after a *Massiah* violation.

The exclusionary rule of *Massiah* v. *United States*, 377 U. S. 201 (1964) should not extend to strike down a confession made in compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966), but after a *Massiah* violation. Extending *Massiah* in this way does not advance any legitimate Sixth Amendment interests, and exacts a heavy price from society.

The cost of striking down Fellers' confession is considerable, since admitting voluntary confessions into evidence serves a vital public interest. See *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986). Unless admitting the confession does substantial harm to the interests protected by the Sixth Amendment, the fruits doctrine should not apply. *Massiah*'s tenuous relationship with Sixth Amendment principles, see Part I, *supra*, is a strong reason for not extending it to this case.

Oregon v. *Elstad*, 470 U. S. 298 (1985) completes the case against extending the fruits doctrine to confessions. *Elstad* rested on two grounds. First, *Miranda*'s Fifth Amendment guarantee served different interests than the Fourth Amendment exclusionary rule which forms the traditional basis for the fruits doctrine. See *id.*, at 304. Applying the fruits doctrine would not serve the Fifth Amendment's goal, and therefore there was no need to suppress the second confession. See *id.*, at 308; *supra*, at 19-20.

The *Elstad* Court also held that taking a confession contrary to *Miranda* did not undermine the voluntariness of the subsequent *Miranda* waiver or the second confession. While an earlier coerced confession can render a later confession involuntary, failing to give *Miranda* warnings only creates a presumption that the first confession was coerced. See *Elstad*, 470 U. S., at 310. Where the first confession was unwarned but voluntary, administering the *Miranda* warnings before a

subsequent interrogation "serves to cure the condition that rendered the unwarned statement inadmissible." *Id.*, at 311.

The fact that the first confession "let the cat out of the bag" did not compromise the voluntariness of the subsequent *Miranda* waiver. See *ibid.* "When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder." *Id.*, at 312. The *Miranda* warnings that preceded the second confession "ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id.*, at 314.

Fellers was given his *Miranda* warnings and gave an express waiver before his jailhouse confession. See *United States* v. *Fellers*, 285 F. 3d 721, 723 (CA8 2002). This also waives his *Massiah* rights. *Patterson* v. *Illinois*, 487 U. S. 285, 293 (1988). *Elstad* demonstrates that Fellers' first voluntary, but *Massiah*-barred incriminating statements do not compromise the validity of his *Miranda* waiver or subsequent confession. Since nothing in his first statement was coerced, the bare fact that it let the "cat out of the bag" did not invalidate Fellers' *Miranda* waiver. The *Miranda* warnings informed Fellers of his rights to silence and counsel, correcting any problems arising from his first incriminating statement.

Elstad is crucial to resolving Fellers' claims. This decision prevents any attempt to suppress Fellers' second statement simply because this first statement was taken contrary to *Miranda*. See *Fellers*, 285 F. 3d, at 724. Since *Massiah* is a Sixth Amendment right, *Elstad* is not identical to Fellers' *Massiah* claim. The decision to admit the second confession had to be consistent with Fifth Amendment principles, see 470 U. S., at 304, while the present case revolves around Sixth Amendment principles which do differ from the Fifth Amendment. See *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980). Differences in constitutional principles did play an important role in determining the reach of the fruits doctrine in *Elstad*, see 470 U. S., at 306 (distinguishing between Fourth

and Fifth Amendment principles), but the differences between the Fifth and Sixth Amendments are not enough to distinguish *Elstad* from the present case.

The right to counsel protects the fairness and the reliability of the trial. See *supra*, at 6-9. Admitting Fellers' second statement does not compromise either principle. While there can be concerns about the reliability of confessions, "*Miranda* serves to guard against 'the use of unreliable statements at trial' . . . ." *Withrow* v. *Williams*, 507 U. S. 680, 692 (1993) (quoting *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966)). Although it is possible for a confession to comply with *Miranda* but still be compelled, that situation is "rare." See *Berkemer* v. *McCarty*, 468 U. S. 420, 433, n. 20 (1984). Voluntary, *Miranda*-compliant confessions such as Fellers' are not simply necessary evils, they are an "unmitigated good . . . ." *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991). Since such confessions come from "the most knowledgeable and unimpeachable source about [the defendant's] past conduct" they can be more reliable than eyewitness testimony. See *Bruton* v. *United States*, 391 U. S. 123, 140 (1968) (White, J., dissenting). If anything, admitting Fellers' second confession made his conviction more reliable. Nor is there any unconstitutional unfairness in admitting Fellers' second incriminating statement. When the accused is informed of the right to counsel and makes an express, voluntary waiver of his rights, there is no need for the presence of counsel during the interrogation. See *Moran* v. *Burbine*, 475 U. S. 412, 426-427 (1986). Since the first incriminating statement did not taint the *Miranda* waiver, there is no unfairness in holding Fellers to his confession.

The defendant's efforts to justify applying the fruits doctrine are at best ineffectual. His claim that suppressing the second confession deters *Massiah* violations, see Brief for Petitioner 19, is readily refuted by *Elstad*, which severs any causal relationship between an illegal but voluntary confession and a subsequent valid confession. Fellers also claims that

applying the fruits doctrine here serves the fair trial interests of the Sixth Amendment.

> "Defendants are entitled to the assistance of counsel at critical pretrial confrontations with the government because of the trial effects of such encounters—namely, that the 'results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality" ' *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984) (quoting [*United States* v. *Wade*, 388 U. S. 218, 224 (1967)])." *Ibid.*

In context, this quote from *Gouveia* limits what is considered "critical":

> "Although we have extended an accused's right to counsel to certain 'critical' pretrial proceedings, *United States* v. *Wade*, 388 U. S. 218 (1967), we have done so recognizing that at those proceedings, 'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both,' *United States* v. *Ash*, [413 U. S. 300, 310 (1973)], in a situation where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.' *United States* v. *Wade*, *supra*, at 224." *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984).

Judged by this standard, questioning by the police is no more "critical" after indictment than it was before. The police are no more expert, and the procedure is no more complex. Fellers second, *Miranda*-compliant, confession is not the type of confrontation that calls into question the fairness or the reliability of the trial. Suppressing the statement would keep a highly credible admission of guilt from the trier of fact while adding nothing to the reliability or fairness of his trial. *Massiah* has already overextended the Sixth Amendment. There is no need to extend it even one more inch.

IV. *Massiah* should be limited to its facts.

Massiah v. *United States*, 377 U. S. 201 (1964) is a decision that warrants ample criticism. It takes the Sixth Amendment right to counsel to its very edge and beyond. See Part I, *supra*. This decision denies society its compelling interest in securing and admitting voluntary admissions of guilt. *Massiah* also creates perverse incentives in our criminal justice system. Decisions to initiate proceedings will not be based upon the strength of the case and the suspect's danger to society, but will also be influenced by the need to further investigate the suspect. See Part I-A, *supra*.

This Court once turned down an opportunity to reexamine *Massiah*. See *United States* v. *Henry*, 447 U. S. 264, 269, n. 6 (1980). *Amicus* suggests that *Henry*'s summary dismissal of the invitation should not foreclose this Court from reexamining *Massiah* in this case. *Massiah* should be limited.

Recent decisions of this Court demonstrate that *stare decisis* is far from an impenetrable barrier to reconsidering precedents. In *Ring* v. *Arizona*, 536 U. S. 584, 589 (2002), this Court partially overruled *Walton* v. *Arizona*, 497 U. S. 639 (1990) in spite of the fact that several state governments relied on *Walton* when constructing their capital punishment procedures. *Lawrence* v. *Texas*, 539 U. S. __, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003) demonstrates that the level of public interest in a case will not prevent its reconsideration. See *id.*, at 525, 123 S. Ct., at 2484 (overruling *Bowers* v. *Hardwick*, 478 U. S. 186 (1986)). Since *Massiah* is a case establishing extra procedural protections for criminal defendants, the reliability interest in *Massiah* is low, making *stare decisis* particularly weak. See, *e.g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991).

Massiah is poorly reasoned, inconsistent with Sixth Amendment principles, and contrary to this Court's precedents. It burdens society by suppressing highly reliable, relevant evidence. See Part I, *supra*. What little legitimate protection

it gives to the accused is largely redundant since *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Since a *Miranda* waiver also waives *Massiah* rights, *Massiah* is unnecessary in virtually any direct confrontation between the accused and the police.

Massiah's only real utility to the defendant is in those cases involving informants. Since this case does not involve police informants, it is unnecessary to decide whether the *Massiah* rule should still hold in these cases. The present case, however, is an appropriate vehicle for removing direct confrontations between the police and the suspects from *Massiah*'s grip.

Brewer v. *Williams*, 430 U. S. 387 (1977) is the only Supreme Court *Massiah* case involving a direct confrontation between the police and the accused. Even under *Brewer*'s unusual facts, a case with the same facts today would reach the same result without *Massiah*. There is a strong case that the Christian burial speech constituted a *Miranda* violation. While there was no express questioning of Williams, *Miranda* is not limited to express questioning. *Rhode Island* v. *Innis*, 446 U. S. 291, 298-299 (1980). Instead, the relevant issue under *Miranda* is whether the defendant was functionally questioned through words or deeds "that the police should know [are] reasonably likely to elicit an incriminating response from the suspect . . . ." *Id.*, at 301 (footnotes omitted). While the *Innis* Court took pains to distinguish *Brewer*, see *id.*, at 300, n. 4, the *Brewer* Court's characterization of Williams' treatment appears to satisfy that standard. "There can be no serious doubt, either, that [the detective] deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." 430 U. S., at 399. Since there was no effective waiver of his previously asserted right to counsel, see *id.*, at 405-406, Williams had a valid *Miranda* claim. Therefore, even if *Massiah* did not apply, the initial statements still would be suppressed under *Miranda*, but the derivative evidence from those statements would still be admitted under inevitable discovery. Even under *Brewer*'s extreme facts, *Miranda*

provides all the necessary protection, and *Massiah* is merely ornamental.

Limiting *Massiah* to its facts, prohibiting the government from using informants to deliberately elicit information from indicted defendants, would involve only a minor disruption of this Court's precedents. The result of the redundant *Brewer* case would not change. Since government informants do not have to give *Miranda* warnings when talking to a suspect, see *Illinois* v. *Perkins*, 496 U. S. 292, 299-300 (1990), *Massiah* itself would not be overruled.

Massiah's precedent now bears little worthwhile fruit. Since *Miranda*, it no longer adds to the fairness of the trial or its integrity in any meaningful way when police directly confront a suspect. In this case, it can only operate to provide the defendant with a windfall, *i.e.*, excluding a statement that would be admissible under the exceptions to *Miranda*.[4] *Elstad* merely because criminal proceedings had commenced. This distinction should not make a difference. *Massiah* should be pruned back.

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit should be affirmed.

September, 2003

Respectfully submitted,

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4. The *Miranda* exceptions survive *Dickerson* v. *United States*, 530 U. S. 428 (2000). See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *United States* v. *Patane*, No. 02-1183, at 6-10.